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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6219

THOMAS BALDASAR,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT
OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF FOR THE PETITIONER

MARY ROBINSON
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State Appellate Defender
First Judicial District
130 North Wells Street, Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:
Ralph Ruebner
Peter Nolte

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT
OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 52 Ill.App.3d 305, 367 N.E.2d 462 (1977) and is reproduced in the Appendix (hereinafter "A") at pages A. 19-30. The unreported order of the Illinois Supreme Court denying the petition for leave to appeal appears at A. 31.

JURISDICTION

The order of the Illinois Supreme Court denying the petition for leave to appeal was entered on November 23, 1977. The petition for a writ of certiorari was timely filed on February 18, 1978. Certiorari was granted on March 19, 1979. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments to the United States Constitution prohibit the use of a prior uncounseled misdemeanor conviction, which did not result in imprisonment, to increase a sentence of imprisonment on a subsequent conviction under an enhanced penalty statute?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The enhanced penalty provision found in *Ill. Rev. Stat.*, 1974, Ch. 38, par. 16-1(e)(1), provides:

> (e) Sentence.
>
> (1) Theft of property not from the person and not exceeding $150 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft is a Class 4 felony.

The sentencing provision for misdemeanors found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-3(a)(1), provides in pertinent part:

> (a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:
>
> (1) for a Class A misdemeanor, for any term less than one year.

The sentencing provisions for felonies found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-1(b)(5), and (c)(5), provide in pertinent part:

> (b)(5) for a Class 4 felony, the maximum term shall be any term in excess of one year not exceeding 3 years.
>
> (c)(5) for a Class 4 felony, the minimum term shall be one year in all cases.

The parole provision found in *Ill. Rev. Stat.*, 1975, Ch. 38 §1005-8-3(e)(3), provides in pertinent part:

(e) Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, the parole term shall be as follows:

(3) for a Class 4 felony, 2 years.

The place of confinement for a misdemeanor found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-6(b), provides in pertinent part:

(b) Offenders sentenced to a term of imprisonment for less than one year may be committed to the custody of the sheriff.

The place of confinement for a felony found in *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-6(a), provides in pertinent part:

(a) Offenders sentenced to a term of imprisonment for a felony shall be committed to the penitentiary system of the Department of Corrections.

The provisions on counsel found in *Ill. Rev. Stat.*, 1975, Ch. 38, §113-3(a) and (b) provide in pertinent part:

(a) Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge.

(b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. . . .

STATEMENT OF THE CASE

Thomas O. Baldasar was charged by information with the theft of one "Dial Massage" having a value of less than $150.00 from Montgomery Ward and Company on November 13, 1975, in DuPage County, Illinois. (A.2)[1] The information alleged that Mr. Baldasar was previously convicted of theft on May 1, 1975, thereby raising the misdemeanor charge to a felony charge under *Illinois Revised Statutes*, 1974, Chapter 38, Section 16-1(a)(1). (A.2)

The jury trial commenced on July 27, 1976. The State presented two witnesses to support the charge. The first was Dan Timmerman, who was employed on November 13 as a security manager at the Montgomery Ward Store in the Yorktown Shopping Center in Lombard. (R.32) Sometime during the day he received a call from Mary Wilkerson, who was on the security staff, and in response to the call he went to the camera department and observed a man there. (R.33)

When Timmerman initially saw this person he was approximately thirty feet across the aisle from him. Timmerman followed him as he walked over to the cosmetics department. Timmerman then went upstairs to an observation post or blind, and observed this man approach the shelf where the shower massage heads were located. (R.33-34) According to Timmerman, this

[1] The prefix "R" denotes a page from the transcript of the record of the trial that has not been reproduced in the Appendix. Also used herein is the prefix "RC" which refers to the portions of the common law record (i.e., pleadings, motions, etc.) which have not been reproduced in the Appendix. References to the Appendix are made with the prefix "A".

person then took one of the shower heads off the shelf, put it underneath his arm, and walked directly out of the store into the mall. (R.34) Timmerman identified this person as the petitioner, Thomas Baldasar. (R.34-35)

People's Exhibit No. 1 was identified by Timmerman as the shower massage head in question, which he took from Baldasar after following him out of the store and into the mall. According to Timmerman, when Baldasar left the store he walked past two cash registers without paying. (R.35-36) Timmerman testified that when he stopped the petitioner, Baldasar said that he did not have a receipt for the shower head but that he had paid for it. (R.37) Baldasar then went peacefully with Timmerman to the security office and was placed under arrest. (R.37, 43)

After identifying People's Exhibit No. 2 as the Montgomery Ward's Charter issued by the Secretary of State, and testifying that the value of the shower head in question was $29.88, the witness was excused. (R.40-43)

The State then called Mr. Sol Valiery who testified that he was a store manager for the Jewel Food Stores. (A.4) Valiery then testified that on May 1, 1975, he was in the Oak Park Village Hall courtroom testifying against Mr. Baldasar, whom he identified in court, on a charge of shoplifting. (A.5) Valiery testified that after a bench trial the judge found Baldasar guilty and fined him $159.00. (A.6) Valiery testified that he signed a complaint against Baldasar and then identified his signature on a document, People's Exhibit No. 3. (A.6)

The State offered into evidence People's Exhibit No. 3, which was a certified copy of a "Half-Sheet" (docket

entry) from the court records of the Circuit Court of Cook County.[2] Defense counsel objected on two grounds.[3] First, there was a discrepancy between the name on the complaint and the petitioner's name. Second, defense counsel alleged that there was no affirmative showing that Baldasar had been represented by counsel at the prior trial as was required by *People v. Dixon*, 46 Ill.2d 41, 268 N.E.2d 369, 371 (1971), and by *Burgett v. Texas*, 398 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). (A.7-8) Defense counsel stated that she knew the evidence would show that Baldasar had not been represented by counsel. However, she said the case law required an affirmative showing by the State that the petitioner was represented by or waived counsel before the certified copy of the conviction could be admitted. (A.8) The court denied the petitioner's motion on the basis that the prior offense was "not a felony." (A.9) Thereafter, People's Exhibit No. 3 was admitted into evidence. (A.9)

On cross-examination Mr. Valiery testified that when he was present in the Oak Park Village courthouse Mr. Baldasar was not represented by counsel. (A.10) The State rested its case. (R.56)

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[2]People's Exhibit No. 3 is reproduced in the Appendix at pages 11 through 15. The exhibit consists of the clerk's certificate that the "Half-Sheet and Order" was a true copy of the original (A.11-12), the complaint (A.13-14), and the "Half-Sheet" listing the docket entries in the cause. (A.15) The half-sheet indicates that Mr. Baldasar's sentence was a fine of $159.00 and one year of probation. (A.15)

[3]The written motion setting forth the grounds for not admitting the certified copy of conviction into evidence was filed on the day of trial and appears at A.3.

Thomas Baldasar then testified that on November 13, 1975, he was in the Yorktown Shopping Center in Lombard, when he entered the Montgomery Ward Store on a lower level, carrying one Dial Massage. (R.57-58) He was intending to return the Dial Massage to the department from which he had purchased it. (R.58)

Baldasar testified that he did not have a sales slip with him at that time and that he went to the cosmetics department but saw no one at the cash register. He testified that he waited around for someone to arrive at the cash register, and that while he was waiting he looked at other items in nearby departments, where he was apprehended by a security person. (R.59-60) He explained to the officer that he was returning merchandise and that he did not have a receipt. He was then taken downstairs to the security office. (R.60-61)

Baldasar testified that he had purchased the Dial Massage approximately one week earlier and had paid approximately $29.00. (R.61) He restated his testimony that he never left the store with the shower head after he had entered, and that he was apprehended inside the store. (R.63-64)

After this testimony, the State introduced People's Exhibit No. 4, which was a certified copy of a 1967 conviction pursuant to a plea of guilty to a charge of armed robbery. (R.65-69)[4] Thereafter arguments were heard. The jury was instructed and returned a verdict of guilty. The petitioner was subsequently sentenced to

[4]This prior conviction was not the basis for the enhanced penalty, but was offered on the question of petitioner's credibility. (R.9, 92)

not less than one nor more than three years in the Department of Corrections. (R.106-107, A.16) A notice of appeal was timely filed. (RC.85)

A divided panel of the Appellate Court of Illinois, Second District, rejected petitioner's argument that the Sixth and Fourteenth Amendments prohibited use of a prior uncounseled misdemeanor conviction, absent a showing of waiver, to enhance his theft conviction to a felony and subject him to much more severe penalties. (A.19-30) The Illinois Supreme Court denied his petition for leave to appeal without comment. (A.31)

SUMMARY OF ARGUMENT

In *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), this Court held that absent a knowing and intelligent waiver of counsel, no person may be imprisoned for an offense regardless of whether it is classified as a felony or a misdemeanor. As in felony cases, "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial." 407 U.S. at 36-37. *Argersinger* commanded that no imprisonment result from an uncounseled conviction. This was violated where petitioner's prior fine-only uncounseled theft conviction was used over objection to raise the present misdemeanor theft offense to a felony and enhance the punishment. The direct consequence of the use of this prior uncounseled misdemeanor conviction was an extra two years of incarceration; without the enhanced punishment, petitioner could have received only a sentence of less than one year, rather than the one- to three-year sentence imposed.

Scott v. Illinois, ___ U.S. ____, 99 S.Ct. 168, 59 L.Ed.2d 383 (1979), is consistent with *Argersinger* in adopting actual imprisonment as the line defining the constitutional right to appointment of counsel. Scott's misdemeanor theft conviction without counsel was upheld because he was sentenced only to pay a fine. Petitioner Baldasar's similar uncounseled misdemeanor conviction would also support imposition of a fine. However, before the severe sanction of deprivation of liberty could result from such a conviction, due process and the Sixth Amendment would require the presence or intelligent waiver of counsel to assure a fair trial and a reliable result.

Had Scott been incarcerated for even a brief period of time, his uncounseled conviction would have been unconstitutional under *Argersinger*. Absent a waiver, liberty could not be deprived without the necessary safeguard of counsel to assure the fairness and reliability of the trial. The Constitution requires a finding that such a conviction also lacks the degree of reliability necessary to support an enhanced sentence and deprivation of liberty at a subsequent date.

Uncounseled felony convictions will not be allowed to enhance punishment for another offense. *Burgett v. Texas*, 383 U.S. 109, 88 S.Ct. 258, 18 L.Ed.2d 319 (1967). There is nothing in *Burgett* to suggest that its rationale is limited to felonies, for counselless misdemeanor convictions are no more reliable than counselless felony convictions. Petitioner contends that while his prior uncounseled misdemeanor conviction may support a fine, the rule of law should prohibit it from supporting enhanced imprisonment for another offense, absent a showing that he was represented by or intelligently waived counsel.

The majority of jurisdictions considering the issue has adopted the above-stated rule as constitutionally required. Such a rule would not affect the "run of misdemeanors," while at the same time it would assure that the constitutional command of no imprisonment without representation by counsel was met. States would not have to afford counsel in all misdemeanor prosecutions. Uncounseled convictions resulting in no imprisonment would still be valid. However, defendants should be represented by counsel, or intelligently waive counsel, if their first convictions are to be used as the basis for enhancing a second sentence which actually results in imprisonment.

ARGUMENT

THE SIXTH AMENDMENT RIGHT TO COUNSEL FORBIDS THE USE OF A FINE-ONLY UNCOUNSELED MISDEMEANOR CONVICTION TO INCREASE PETITIONER'S IMPRISONMENT ON A SUBSEQUENT OFFENSE UNDER AN ENHANCED PENALTY STATUTE.

A. Actual Imprisonment Without Representation In Violation of *Argersinger* and *Scott* Resulted When Petitioner's Prior Uncounseled Misdemeanor Conviction Was Used To Enhance Petitioner's Subsequent Imprisonment By Two Years.

In *Scott v. Illinois*, 59 L.Ed.2d 383, 389 (1979), this Court clarified its prior decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and held that actual

imprisonment was the line defining the constitutional right to the appointment of counsel. Under this approach, petitioner Baldasar's prior uncounseled misdemeanor theft conviction for which he was fined $159 was a valid conviction like that of petitioner Scott.[5] However, when the trial court in this case overruled petitioner's objection to the introduction of the prior theft conviction for purposes of raising the present misdemeanor theft charge to a felony, the petitioner's constitutional right not to be imprisoned on the basis of an uncounseled conviction was violated. As the dissenting appellate court justice noted, "[h]ere, the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence." (A.30).

Argersinger held that the denial of the assistance of counsel would preclude the imposition of a jail sentence. *Scott v. Illinois* is consistent with this principle, since this Court acknowledged the difference between a fine or the mere threat of imprisonment and actual incarceration. There was no constitutional right to counsel in *Scott*, since the fine imposed was a much less severe sanction than deprivation of liberty.

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[5]Petitioner was also sentenced to a one-year term of probation. (R.15) Petitioner did not challenge this sentence on direct appeal. Had petitioner appealed the issue the court may have been unwilling to affirm the sentence of probation because it might ripen into unconstitutional imprisonment. (See *United States v. White*, 529 F.2d 1390 (8th Cir., 1976), explained in subsection C of the brief). However, under *Scott v. Illinois*, the prior uncounseled theft conviction and fine would have been affirmed. Thus, the sentence of probation does not affect the question presented in this case.

Petitioner Baldasar's prior uncounseled conviction, like Scott's conviction, is constitutionally valid. However, if incarceration had been imposed at the time of sentence it would be presumed invalid, since counsel was not present, and there was no showing that Baldasar was notified that he was entitled to retain counsel[6] or, if indigent, to have counsel provided. Petitioner Baldasar's conviction, like Scott's conviction, would not support a sentence of imprisonment as a direct result of his uncounseled misdemeanor trial. If the State is precluded from imposing imprisonment on the initial sentencing date, it must also be precluded from using this counselless misdemeanor conviction in a separate proceeding to enhance punishment. Neither *Argersinger* nor *Scott* can be distinguished merely because the imprisonment results on a later day.

The immediate result of petitioner Baldasar's prior uncounseled conviction for theft was not imprisonment in the penitentiary. Rather, he was fined and placed on probation. However, but for the existence of Baldasar's prior uncounseled misdemeanor theft conviction, the State would not have been allowed to prosecute the instant thirty-dollar misdemeanor theft as a felony which resulted in a sentence of one to three years' imprisonment in the penitentiary, as opposed to another institution.[7] The additional two years' im-

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[6]*Illinois Revised Statutes*, 1975, Chapter 38, §113-3(a), provides that every person charged with an offense shall be allowed counsel before pleading to the charge.

[7]*Illinois Revised Statutes*, 1975, Chapter 38, §1005-8-6(b), allows misdemeanants to be committed to the custody of the sheriff. Petitioner also suffered a two-year parole term which automatically accompanied a conviction for a Class 4 felony in Illinois. *Ill. Rev. Stat.*, 1975, Ch. 38, §1005-8-1(e)(3). No parole term is imposed upon those convicted of misdemeanors.

prisonment is directly attributable to the prior uncounseled misdemeanor conviction. Such a result violates the command of *Argersinger* that in those misdemeanors "... that end up in the actual deprivation of liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy". 407 U.S. at 40. Not only does the use of the prior uncounseled conviction violate the no imprisonment holdings in *Argersinger* and *Scott*, but as demonstrated below it also conflicts with the rationale of these decisions.

B. Convictions Obtained In The Absence Of Counsel Or Waiver Thereof Lack The Degree Of Reliability Necessary To Support An Enhanced Punishment Which Results In A Deprivation Of Liberty.

It has often been said by this Court that due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). *Argersinger* and *Scott* consistently follow this approach. Since a deprivation of liberty is a more severe sanction than a fine, the Constitution requires the additional safeguard of counsel or waiver of counsel in cases resulting in actual imprisonment. Convictions obtained without the guiding hand of counsel do not have the degree of reliability necessary to justify punishment either as a direct or a collateral result.

Because uncounseled convictions do not have the requisite degree of reliability, they cannot support imprisonment regardless of whether it occurs at the

time of conviction or in a subsequent proceeding to enhance punishment. This Court has precluded the use of an uncounseled felony conviction to "support guilt or enhance punishment" in *Burgett v. Texas*, 389 U.S. 109, 115 (1967). The *Burgett* rule was founded on the recognition that the absence of counsel "... so jeopardizes the fairness of the trial that any ensuing conviction is likely to be unreliable." *Gilday v. Scafati*, 428 F.2d 1027, 1029 (1st Cir., 1970). *See also, Loper v. Beto*, 405 U.S. 473, 483, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), which approved the holding of *Gilday, v. Scafati*, and agreed that the absence of counsel impairs the reliability of the conviction. Under the rationale of *Burgett* this Court should not allow uncounseled misdemeanor convictions to support guilt or enhance punishment.

This Court in *Argersinger* recognized that regardless of whether the offense was classified as a felony or misdemeanor, without counsel's assistance, even one not guilty faced the danger of conviction because he did not know how to establish his innocence.[8] *Argersinger*,

[8] In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Court ruled that a defendant could represent himself if he voluntarily and intelligently chose to do so. In so ruling the majority recognized that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts". 422 U.S. at 834. Three Justices of the Court believed counsel to be so indispensible that a defendant had no constitutional right to be tried without counsel. The Chief Justice emphasized the absolute necessity of counsel for a fair trial observing "that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." 422 U.S. at 838 (dissenting). Justice Blackmun made reference to the old proverb in stating that the Court had bestowed a constitutional right to make a fool of oneself by self-representation. 422 U.S. 852 (dissenting).

407 U.S. at 31. Questions presented in a case which lead to imprisonment even for a brief period of time are often complex and beyond the usual competence of the accused:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932), quoted in *Argersinger v. Hamlin*, 407 U.S. at 29.[9]

[9]The Chief Justice in his opinion concurring in the result echoed these remarks in stating.

> . . . [A]ny deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman when he is opposed by a law trained prosecutor.

Argersinger, 407 U.S. at 41.

In *Burgett v. Texas*, 389 U.S. 109 (1967), proof of the prior conviction was an element of the State's case in chief and, like the instant case, the prior conviction was alleged in the charging instrument. The prosecution in *Burgett* introduced a prior Tennessee conviction over the objection that it did not facially indicate whether counsel was present or had been waived. This Court reversed the case because the records of the prior conviction on their face raised a presumption that Burgett was denied his right to counsel in the Tennessee proceeding, and therefore his conviction was void. 324 U.S. at 114-115.

Petitioner Burgett was imprisoned for his prior uncounseled conviction, while the present petitioner was not. This fact, however, should not serve to distinguish the two cases, for the absence of imprisonment on petitioner's first theft conviction adds nothing to its reliability. Both Burgett's and petitioner's convictions are unreliable to the same degree because of counsel's absence, and it is that fact that should control. In *Burgett* it was recognized that the accused was suffering anew[10] from the initial deprivation of counsel. 389 U.S. at 115. Petitioner Baldasar, on the other hand, did not suffer imprisonment as a result of his uncounseled conviction until the subsequent conviction when his sentence was enhanced. However, the resulting imprisonment was just as unconstitutional as if he had been imprisoned on his first conviction.

[10]*Burgett's* recognition that the right was being denied anew is contrary to the state court's view that Baldasar's prior uncounseled conviction did not result directly or collaterally in imprisonment for that offense. (A.24)

C. The Majority Of Jurisdictions Confronting The Issue Has Prohibited The Use Of Such Uncounseled Misdemeanor Convictions Without Affecting The "Run Of Misdemeanors."

Petitioner's approach set forth above has been followed by the great majority of courts that has reviewed the issue. In *City of Monroe v. Fincher*, 305 So.2d 108 (La., 1974), the Louisiana Supreme Court prohibited an uncounseled first offense for driving while under the influence of intoxicants from being used to enhance a second conviction for the same offense. Like Baldasar, Fincher had not been imprisoned for the first offense, but the court reasoned that *Argersinger* was violated:

> . . . It may readily be seen that under the statutory scheme for DWI, the first conviction causes imprisonment after a second conviction of the accused for DWI–that first conviction *ends up* in defendant's imprisonment, although such imprisonment does not immediately succeed the first conviction. Before a conviction for any offense *may result* in imprisonment, an accused must have been represented by counsel or have knowingly and intelligently waived the assistance of counsel, as we appreciate the import of the *Argersinger* decision. (emphasis original)

City of Monroe v. Fincher, 305 So.2d 108, 110 (La., 1974). Because the record of Fincher's first conviction did not establish that he had counsel or had made a waiver of counsel, the conviction could not be used under the second-offender provision. The *Fincher* holding was later applied by the same court in a case where it also relied on *Burgett v. Texas*, 389 U.S. 109 (1967). *See, State v. Strange*, 308 So.2d 795 (La., 1975).

In agreement is *Mure v. State*, 478 P.2d 926, 928 (Okla. Crim. App., 1970), where the court refused to find *Burgett v. Texas* distinguishable on the basis that it applied only to felonies. In addition, *State v. Kirby*, 33 Ohio Misc. 48, 51-52, 289 N.E.2d 406, 408 (1972), relies on *Argersinger* and *Burgett* for the proposition that when an uncounseled conviction, upon which the defendant was only fined, is used to support guilt or enhance punishment, "it effectively becomes a 'serious offense' (here a felony), which requires that the records of prior convictions show that defendant was represented by counsel . . .", or waived counsel, before it can be used in the subsequent prosecution. Prior to *Argersinger*, this same approach was employed in *State v. Reagan*, 103 Ariz. 287, 289, 440 P.2d 907, 909 (1968). In light of *Gideon v. Wainwright*, 372 U.S. 335 (1961), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Burgett v. Texas, supra*, the Supreme Court of Arizona found that a prior fine-only counselless conviction of petty theft could not be used to enhance punishment.

Similar approaches have been taken in other jurisdictions in somewhat analogous situations.[11] In

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[11]The majority panel of the state appellate court held that if the *Argersinger* principle were applied to petitioner's case, there would be little rational reason why it would not preclude the introduction of such convictions for impeachment or use at a sentencing hearing. (A.25). The dissent distinguished these situations from the enhancement context because imprisonment *via* enhancement was a far more direct consequence from the use of the prior conviction than other instances where the convictions was used. (A.28-29).

Initially, it should be noted that these questions concerning the collateral consequence with regard to impeachment and sentencing were not before the court. Petitioner agrees with the

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Morgan v. State, 235 Ga. 632, 221 S.E.2d 47 (1975), the Georgia Supreme Court refused to allow an uncounseled misdemeanor conviction for which only a fine was imposed to be considered at the sentencing phase of the case absent a valid waiver of counsel.

In *State v. Harris*, 312 So.2d 643 (La., 1973), the court prohibited a plea of guilty to possession of marijuana, where a fine-only had been imposed, to be used as a basis to revoke probation, where the State did not demonstrate that the defendant's plea had been made with the benefit of counsel or that the defendant had waived his right to counsel.

In *Alexander v. State*, 527 S.W.2d 927, 929 (Ark., 1975), the Arkansas Supreme Court refused to allow an uncounseled misdemeanor conviction and sentence which did not include imprisonment to be the sole basis

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dissenting state court judge that imprisonment in the enhancement situation is a more direct result of the prior uncounseled conviction than in other situations. The discussion of the analogous cases is relevant to show that even where the effect of the conviction is more remote, courts are refusing to rely on such convictions that do not evince the necessary degree of reliability. In the event this Court reaches the questions of whether an uncounseled conviction can be used to impeach a defendant, to revoke a suspended sentence, to revoke parole or probation, or to be considered in determining the proper sentence, petitioner urges that unreliable convictions be prohibited from contributing in any manner to a conviction or sentence that results in imprisonment. As this Court stated in *Loper v. Beto*, 405 U.S. 473, 483 (1972): "The absence of counsel impairs the reliability of the conviction just as much as when used to impeach as when used as direct proof of guilt." Nor should it be used for sentencing. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972).

to revoke a suspended sentence because only a fine was assessed, stating "... we interpret *Argersinger v. Hamlin* as holding that an uncounseled municipal court conviction involving only a fine, and valid for that purpose, cannot be collaterally used to deprive a person of his liberty". The court noted that it was in agreement with the author of the law review article entitled *Argersinger v. Hamlin and The Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented By Counsel At Trial*, 35 Ohio St.L.J. 168 (1974). That writer had reasoned that the collateral use of a counselless misdemeanor conviction would soon vitiate the right of counsel as stated in *Argersinger* and be contrary to the conclusions expressed in the last paragraph of that decision.

Also agreeing with the commentator noted above was the court in *Commonwealth v. Barrett*, 322 N.E.2d 89, 93 (Mass. App., 1975), quoting the passage that: "Since the Court prohibited imprisonment based upon an unreliable conviction obtained at an unfair trial, the Court would probably not permit unreliable trials to have a delayed impact resulting in imprisonment." In view of this, defendant Barrett's conviction was reversed. The court held that prior uncounseled misdemeanor convictions, themselves constitutionally proper under *Argersinger* because only fines were imposed, could not constitutionally be used for impeachment in a subsequent proceeding that led to imprisonment. *Commonwealth v. Barrett* was cited with approval by the Massachusetts Supreme Court in *Carey v. Zayer of Beverly Inc.*, 324 N.E.2d 619 (Mass., 1975) (the court found that *Barrett* would not forbid the use of such convictions in a civil suit, since *Argersinger* does

not prohibit the imposition of fines in uncounseled trials).

In *Martson v. Oliver*, 485 F.2d 705, 708 (4th Cir., 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652,, 41 L.Ed.2d 240 (1974), the court interpreted the scope of *Argersinger*:

> In sum, *Argersinger* purported to excise from the misdemeanor conviction only those consequences that related to loss of liberty and imprisonment. So far as its direct or collateral consequences are the loss of liberty on the part of the defendant, *Argersinger* applies. . . .

The consequences of the enhanced imprisonment that petitioner Baldasar received are somewhat similar to the circumstances that arise when a petitioner is tried without counsel and receives a suspended sentence. In both situations the defendant does not directly go to jail, but may face incarceration as the result of a subsequent violation. In *United States v. White*, 529 F.2d 1390 (8th Cir., 1976), the court was of the opinion that when a judge chooses to try an indigent defendant without counsel he loses not only the alternative of sentencing the defendant directly to jail, but also the alternative of giving a suspended sentence which might later ripen into an unconstitutional deprivation of liberty at a later day. Therefore, the court in *United States v. White* vacated the suspended sentence, while affirming the conviction and fine.

Thus, the majority of cases[12] concerning the issue

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[12]Cases to the contrary exist and include *State v. McGrew*, 127 N.J. Super 327, 317 A.2d 390 (1974); and *Aldrighetti v. State*, 507 S.W.2d 770 (Tex.Crim.App. 1974), but see Presiding Justice Onion's dissent which points out the following possible inconsistencies in such a ruling:

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presented here, as well as cases in analogous areas, adopt the approach suggested by petitioner Baldasar. The cases cited above belie the argument made by the majority panel of the state appellate court (A.21) that were the court to accept the petitioner's argument, the "run of misdemeanors" would be affected. 407 U.S. at 40. The states above still employ enhancement statutes. Moreover, the fact remains that under *Scott v. Illinois*, there would be no question that counselless misdemeanor convictions resulting in fine only would still be constitutionally valid. Petitioner simply asks that the States be precluded from using counselless misdemeanor convictions for enhancing penalties which result in actual imprisonment in subsequent prosecutions. A similar holding can be found in *Mure v. State*, 478 P.2d 926, 928 (Okla.Crim.App., 1970):

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> Under today's new rule, an accused who was convicted of a misdemeanor pre-*Argersinger* without counsel where the trial judge or jury had the full range of possible penalties, including imprisonment, before it for consideration and who decided under the circumstances of the case that a fine only was the appropriate punishment can have that conviction used against him again for enhancement of punishment in another case or for the purpose of impeachment. On the other hand, under the rule announced today, if a defendant was convicted of a misdemeanor, pre-*Argersinger*, without counsel, and the assessor of punishment determined that the proper punishment was imprisonment, then such conviction cannot be used for enhancement of punishment or for impeachment.
>
> Which type of such prior conviction really has the greatest bearing on the credibility of the accused in a future case when he is a witness on his own behalf? The question answers itself. 507 S.W.2d at 775.

> We are not stating that a defendant must be represented in all misdemeanors. We are of the opinion that a defendant should be represented by counsel, or intelligently waive the same, in all cases wherein a first conviction may be the basis for a subsequent higher offense.

Petitioner Baldasar contends that the Sixth and Fourteenth Amendments require the adoption of a similar rule which would assure that enhanced punishment would flow only from those prior convictions where a criminal defendant was represented by or intelligently waived counsel. It is only in that manner that this Court can assure that a conviction is sufficiently reliable to be a valid basis for depriving one of his liberty.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

MARY ROBINSON
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
63 Douglas Avenue
Elgin, Illinois 60120

MICHAEL MULDER
Assistant Defender
Office of the State Appellate Defender
First Judicial District
130 North Wells Street, Suite 2200
Chicago, Illinois 60606
(312) 793-5472

Counsel for Petitioner

Of Counsel:

RALPH RUEBNER
Deputy Defender
Office of the State Appellate Defender
130 North Wells Street, Suite 2200
Chicago, Illinois 60606

PETER B. NOLTE
Suite 503
Rock River Savings Building
Rockford, Illinois 61101